TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted]331

JAMES C. DAVIS, AGENT, PLAINTIFF IN ERROR,

vs.

L. L. COHEN & COMPANY, INC.

IN ERROR TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS

Compliments with the method pursued

FILED MARCH 20, 1924

(30,209)

May 09 — [illegible]
for stat of limitations

Feb. 1919 statement came back to Ch Ct —
Act brot Jan '20 against the M & H R R — Not Dy —
Mot to dsp 21. 1922. pet. summons oct 7 —
This too late. 6/0. 2 years & 1 da. See 206 a adopted
State stat — Dy & worth time of two years
of this Mot 1922. Dy Ap & Mo to dis p 7
McK W/4? Cas p 7 - Mass Stat p 14 & 20 Rep

(30,209)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 899

JAMES C. DAVIS, AGENT, PLAINTIFF IN ERROR,

vs.

L. L. COHEN & COMPANY, INC.

IN ERROR TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 20, 1924

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[fol. 1] COMMONWEALTH OF MASSACHUSETTS:

JUDGE'S CERTIFICATE TO CLERK

I, Walter Perley Hall, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, do certify that Edwin L. Barney, Esquire, whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court for the County of Bristol, and hath the keeping of the files, records and proceedings of said Court within and for said County; that he is, by law, the proper person to make out and certify copies of the files, records and proceedings of said Court; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, of the files, records and proceedings of the said Superior Court, is in due form.

In testimony whereof, I have set my hand, and caused the seal of said Court to be hereunto affixed, this eighteenth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

Walter Perley Hall, Chief Justice of the Superior Court.

(Seal of the Superior Court.)

[fol. 2] COMMONWEALTH OF MASSACHUSETTS,
Bristol, ss:

CLERK'S CERTIFICATE TO JUDGE

I, Edwin L. Barney, Clerk of the Superior Court within and for said County of Bristol, hereby certify that the Honorable Walter Perley Hall, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this eighteenth day of March in the year of our Lord one thousand nine hundred and twenty-four.

Edwin L. Barney. (Seal of the Superior Court.)

[fol. 3] COMMONWEALTH OF MASSACHUSETTS,
Bristol, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among our records of our Superior Court for the said County of Bristol it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS,
Bristol, ss:

IN SUPERIOR COURT OF BRISTOL COUNTY

SUMMONS AND RETURN

(Seal.) To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of The New York, New Haven & Hartford Railroad Company, a corporation duly organized by law and having an usual place of business in the city of Taunton, and controlled and operated by the United States Railroad Administration, to the value of Two Thousand Dollars and to summon the said The New York, New Haven & Hartford Railroad Company (if it may be found in your precinct) to appear before our Justices of our Superior Court, to be holden at Taunton within and for our said County of Bristol, on the first Monday of February next; then and there in our said Court to answer unto L. L. Cohen & Co., Inc., a corporation duly organized by law and having an usual place of business in said Taunton, in an action of Contract, to the damage of the said L. L. Cohen & Co., Inc. (as it says) the sum of Two Thousand Dollars which shall then and there be made to appear, with other due damages. And have you there this Writ with your doings therein.

Witness, John A. Aiken, Esquire, at Taunton, the ninth day of January in the year of our Lord one thousand nine hundred and twenty.

Simeon Borden, Clerk.

[fol. 4] On which said writ return of service was made in the words and figures following, to wit:

BRISTOL, ss:

January 13, 1920.

By virtue of this writ I this day attached a chip as the property of the within named defendant corporation and on the same day I summoned it for its appearance at Court by giving in hand to Ruel S. Harvey, Chief Clerk, for the within named defendant corporation a summons of this writ together with a true and attested copy.

Charles J. Nichols, Deputy Sheriff.

Fees:

Service	$1.00
Copy	1.00
Travel	.10
	$2.10

SUPERIOR COURT OF BRISTOL COUNTY

L. L. COHEN & CO., INC.,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD R. R. COMPANY

DECLARATION

And the plaintiff says that the defendants were common carriers with an usual place of business in the city of Taunton, and that on the 13th day of December, 1918, the Plaintiff caused to be shipped from said Taunton on one of the cars owned and operated by the defendant, its servants or agents, in the conduct of its business as common carrier, one carload of scrap iron, on Car Initial Wab. Car No. 28493 consigned to Midvale Steel & Ordnance Company, Coatesville, Pa., by P. R. R. route, same being in good order and condition when shipped, and which was to be taken care of and to be safely and securely conveyed by the defendant corporation in like good order and condition and in consideration thereof and of a reasonable [fol. 5] compensation paid it by the Plaintiff the said defendants became by law bound and obliged as common carriers as aforesaid, and undertook and promised the plaintiff to take care of and safely convey the said goods, and deliver the same as aforesaid; yet the defendants did not take care of and securely convey and deliver said goods in good order and condition to the said Midvale Steel & Ordnance Company, and on the contrary conducted itself in direct violation of its contract with the plaintiff so that when the iron was delivered in Coatesville, the consignee refused to accept the same by reason of the poor condition which was caused by the failure of the defendant, its agents or servants, to comply with its contract, whereby the plaintiff suffered great damage as stated in its writ.

L. L. Cohen & Co., Inc., by its Attorneys, Louis Swig, Irving Bertman.

APPEARANCE FOR DEFENDANT

On said 1st Monday of February A. D. 1920, the plaintiff appeared by Louis Swig, Esquire, and Irving Bertman, Esquire, its Attorneys as aforesaid and entered the above entitled action.

Thereafter on the 17th day of February A. D. 1920 the following appearance, in writing, was entered, to wit:

BRISTOL, ss:

SUPERIOR COURT

L. L. COHEN & Co., INC.,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD R. R. Co.

In the above action I appear for the defendant.
F. A. Farnham. B.

[fol. 6] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

DEFENDANT'S ANSWER—Filed February 17, 1920

The defendant denies each and every allegation in plaintiff's writ and declaration set forth.

And further answering, the defendant says that at the time of the alleged injury the plaintiff was guilty of negligence which contributed to said injury.

By Its Attorney, F. A. Farnham. B.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

APPEARANCE—Filed July 1, 1920

In the above action I appear for the defendant.
A. W. Blackman, 591 South Station, Boston, Mass.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

PLAINTIFF'S MOTION TO AMEND WRIT AND DECLARATION—Filed September 21, 1922

Now comes the plaintiff in the above-entitled matter and prays that the writ and declaration be amended by striking out the name [fol. 7] New York, New Haven & Hartford Railroad Company, wherever the same appears and by substituting in place therefor the following: James C. Davis, Agent, and the Director General of Rail-

roads, in possession and control of the New York, New Haven and Hartford Railroad Company, as party defendant.

L. L. Cohen & Co., Inc., by Its Attorneys, Louis Swig, Irving Bertman.

The foregoing motion was duly allowed on said twenty-first day of September A. D. 1922 and process ordered to issue.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

MOTION TO CONTINUE CASE ON THE DOCKET—Filed September 26, 1922

Now comes the plaintiff herein and prays that the above-entitled case be allowed to remain on the docket, and says that this case was ready for trial at the sitting of Court held at Taunton, September 1921, but the presiding Justice declined to hear the case. The case was marked for trial at the March, 1922 term but was not reached because assigned cases occupied the entire term of Court. The case was marked for trial at the September 1922 sitting at Taunton at which time motion was made, and allowed, for the substitution of another party defendant, and the case was continued until the next term of Court at Taunton.

L. L. Cohen & Co., Inc., by Its Attorney, Louis Swig.

[fol. 8] Jurat showing the following was duly sworn to by Louis Swig omitted in printing.

SUPERIFR COURT OF BRISTOL COUNTY

[Title omitted]

ORDER TO GIVE NOTICE AND RETURN—October 7, 1922

This is an action of contract to recover two thousand dollars ($2,000) alleged to be due to the plaintiff from the defendant on the ninth day of January A. D. 1920 as set forth in the plaintiff's writ of that date.

And now, it appearing in the above-entitled case that a motion to amend the writ and declaration in said case by striking out the name New York, New Haven and Hartford Railroad Company wherever the same appears and substituting in place thereof the following, James C. Davis, Agent and Director General of Railroads in possession and control of the New York, New Haven and Hartford Railroad Company as party defendant was filed and allowed September

21, 1922, and it further appearing that no personal service of said writ has been made upon said defendant James C. Davis, Agent and Director General, it is ordered by the court, here, that the plaintiff [fol. 9] give notice to the said James C. Davis, Agent and Director General as aforesaid, of the pendency of this action, and to appear before said Court to be held at Taunton within and for the County of Bristol, on the first Monday of November next, to answer to the same, by causing the said James C. Davis, Agent and Director General as aforesaid, to be served with an attested copy of this order fourteen days at least before the first Monday of November next; and that this action be continued until notice shall be given to the defendant James C. Davis, Agent and Director General as aforesaid, agreeably to this order.

Simeon Borden, Clerk.

Afterwards, to wit, on the twentieth day of October, 1922, the aforesaid order was returned into Court with the following endorsed thereon, to wit:

Oct. 11, 1922.

BRISTOL, ss:

I have this day served the within order of notice upon the within named James C. Davis, Agent and Director General of Railroads, by giving in hand to Ruel S. Harvey, Chief Clerk for the New York, New Haven and Hartford Railroad Co., a true and attested copy of this order of notice.

Charles J. Nichols, Deputy Sheriff.

Fees:

Service	$1.00
Copy	1.00
Travel	.10
	$2.10

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

SPECIAL APPEARANCE FOR DEFENDANT—Filed November 7, 1922

The Clerk will please enter my appearance specially for James C. Davis, alleged agent for the purpose of contesting jurisdiction.

A. W. Blackman, Attorney Appearing Specially.

[fol. 10] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

MOTION TO DISMISS—Filed November 7, 1922

Now comes James C. Davis, defendant herein alleged Agent and Director General appearing specially for the purpose of this motion, and without consenting to the jurisdiction of this Court moves that the service of the writ summoning said defendant to appear and answer be set aside and that this action as against him be dismissed upon the following grounds:

1. That this Court is without jurisdiction to entertain this action against the above-named defendant.

2. That the issuance and service of said writ summoning the above-named defendant to appear and answer are null and void because in violation of and in conflict with Sec. 206 of the Act of Congress of February 28, 1920, known as the Transportation Act.

3. That this proceeding against the above-named defendant was not instituted within the time prescribed by the said section of the Transportation Act.

4. That this action as against the above-named defendant was not instituted in the manner provided by the above-named section of the Transportation Act.

5. That no service has been made upon said defendant as required by the Transportation Act.

6. That no service has been made upon said defendant in accordance with the provisions of the General Laws of this Commonwealth, [fol. 11] and that under said laws this Court has no jurisdiction to entertain this action against said defendant.

7. That the provisions of the General Laws of said Commonwealth under authority of which the above-named defendant is summoned as party defendant in this action, if they purport to authorize the proceedings herein, are repugnant to the provisions of the Transportation Act and, therefore, said proceedings are null and void and without authority of law.

8. That it appears from the record of the return on the writ herein issued to the above-named defendant that no service of said writ has been made upon the above-named defendant in accordance with the provisions of the laws of Massachusetts and, therefore, such service is null and void.

Wherefore, the above-named defendant says that he should not be held to answer herein; that the service of the writ herein should be set aside; and that this action as against him should be dismissed.

James C. Davis, Alleged Agent, by his attorney appearing specially for the purpose of this motion, A. W. Blackman.

On the second day of January A. D. 1923, said motion to dismiss was denied by the Court and the defendant was allowed ten (10) days in which to file answer.

Also, on the second day of January A. D. 1923, the motion under Rule 63, was allowed by the Court.

On the fourth day of January, A. D. 1923, the defendant filed a claim of exceptions and appeal.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

[fol. 12] DEFENDANT'S ANSWER—Filed January 4, 1923

Now comes James C. Davis, Alleged Agent and not waiving his motion to dismiss heretofore filed in said cause, but relying upon the same, and not admitting the jurisdiction of this Court over said defendant, files this answer in compliance with an order of Court, and says

1. That this Court has no jurisdiction over this defendant in this action for the reasons more fully set forth in detail in this defendant's motion to dismiss heretofore filed, and this defendant expressly relies upon said grounds of defense as if set forth more fully herein.

2. And further answering this defendant denies each and every allegation in the plaintiffs' writ and declaration contained.

3. And for further answer this defendant says that the plaintiffs' alleged cause of action arises out of and in connection with a shipment of freight in interstate commerce from Whittenton, Mass., to Coatesville, Pa., on or about December 13, 1918; that a reasonable time for delivery of said shipment at said destination was not later than two months after said December 13, 1918; that said shipment was refused by the consignee at said destination and returned to the plaintiff at Taunton, at which point it was tendered for delivery to the plaintiff on or about February 20, 1919; that the plaintiff thereupon on said February 20, 1919, refused to accept said shipment; that said shipment of freight was made under and in pursuance with the terms and conditions of a bill of lading of standard form, one of the conditions of which was that "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed"; that plaintiffs' action or proceeding against this defendant was begun by writ of attachment or other process dated October 7, 1922, and returnable in this Court the first Monday of November, 1922; that said process was attempted to be served on October 16, 1922, by leaving an attested copy thereof

[fol. 13] with H. E. Astley, Division Superintendent at Taunton, Mass., of the New York, New Haven and Hartford Railroad Company; that if it be held that said attempted service was a good service upon this defendant yet this defendant says that said action was not begun against this defendant within the period of two years and one day required under the terms and conditions of said bill of lading.

James C. Davis, Alleged Agent, by His Attorney, A. W. Blackman.

On the sixth day of January, A. D. 1923, the defendant filed a bill of exceptions to the overruling of the motion to dismiss which was filed November 7, 1922, and said bill of exceptions was allowed by the Court on the thirteenth day of March, A. D. 1923. A copy of said bill of exceptions is annexed hereto.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

VERDICT—September 17, 1923

The Jury find for the Defendant by direction of Court.

William R. Chase, Foreman.

September 17, 1923.

On the sixth day of October A. D. 1923, a report to the Supreme Judicial Court was filed. A copy of said report is annexed hereto. Thence the suit was continued from time to time until the fifth day of January A. D. 1924, when, on said day, the following Record was received in our said Superior Court, to-wit:

[fol. 14] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

REPORT TO THE SUPREME JUDICIAL COURT

This is an action of contract in which the plaintiff seeks to recover damages to a carload of scrap iron shipped by the plaintiff in December 1918. The pleadings are made a part hereof and may be referred to.

After the defendant's motion to dismiss was overruled by Duque, J., which ruling is the subject of defendant's bill of exceptions to be argued herewith, said Davis was ordered to answer and filed an answer as follows:

"Now comes James C. Davis, Alleged Agent and not waiving his Motion to Dismiss heretofore filed in said cause, but relying upon the same, and not admitting the jurisdiction of this Court over said defendant, files this answer in compliance with an order of Court, and says

1. That this Court has no jurisdiction over this defendant in this action for the reasons more fully set forth in detail in this defendant's Motion to Dismiss heretofore filed, and this defendant expressly relies upon said grounds of defense as set forth more fully therein.

2. And further answering this defendant denies each and every allegation in the plaintiff's writ and declaration contained.

3. And for further answer this defendant says that the plaintiff's alleged cause of action arises out of and in connection with a shipment of freight in interstate commerce from Whittenton, Mass., to Coatesville, Pa., on or about December 13, 1918; that a reasonable time for delivery of said shipment at said destination was not later than two months after said December 13, 1918; that said shipment was refused by the consignee at said destination and returned to the plaintiff at Taunton at which point it was tendered for delivery to the plaintiff on or about February 20, 1919; that the plaintiff there- [fol. 15] upon on said February 20, 1919 refused to accept said shipment; that said shipment of freight was made under and in pursuance with the terms and conditions of a bill of lading of standard form, one of the conditions of which was that "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed"; that plaintiff's action or proceeding against this defendant was begun by writ of attachment or other process dated October 7, 1922 and returnable in this Court the first Monday of November 1922; that said process was attempted to be served on October 16, 1922 by leaving an attested copy thereof with H. E. Astley, Division Superintendent at Taunton, Mass., of the New York, New Haven and Hartford Railroad Company; that if it be held that said attempted service was a good service upon this defendant yet this defendant says that said action was not begun against this defendant within the period of two years and one day required under the terms and condition of said bill of lading."

The action came on for trial before me and a jury, September 17, 1923. At the trial there was evidence offered by the plaintiff, which was not disputed by the defendant, that the plaintiff on receipt of an order from The Perry, Buxton, Doane Company shipped from Taunton, Mass., December 13, 1918, scrap iron consigned to Midvale Steel & Ordnance Company, Coatesville, Pa. The property shipped was described as "one carload scrap iron" and was loaded into and forwarded in car Wabash 28493. At time of shipment the plaintiff sent an invoice for the value of the car, namely,

$1095.37 to The Perry, Buxton, Doane Company, which concern on receipt of said invoice and the bill-of-lading paid the plaintiff on account 75% of the invoice. In loading the car the plaintiff placed at one end of the car sheet iron scrap, which was tied up in bundles. At the other end of the car the plaintiff loaded skeleton scrap so-called, which was tied up in bales. In the middle of the car, plaintiff loaded what was called tack or nail scrap, which consisted of very small particles resulting from the manufacture of tacks or nails. The car Wabash 28493 into which the shipment was loaded was what is known as a "sideboard flat." That is, it was a flat car open at the top with wooden sides and ends, perhaps four feet in height. The scrap was loaded into the car as described, but without any partitions or other means of separation between the kinds of scrap. The car in question was shipped to fill an order secured by The Perry, Buxton, Doane Company at the market price prevailing on the date of the Armistice in the great War. Subsequent to the Armistice the market dropped sharply.

[fol. 16] The defendant admitted, and it was stipulated, that while the car was in transit between Taunton, Mass., and Coatesville, Pa., and on the lines of Pennsylvania System it became reasonably necessary to transfer the contents from the original car, and that the contents of the car were so transferred from the original car into car Penn 261461, which was known as a battleship hopper car. This car was described by witnesses as being a large steel car with sides as high as a man could reach and with one or two hoppers on the bottom which were contrivances in the shape of a "V" which could be opened to permit unloading through the botttom. The scrap iron in question weighed 104410 pounds. A witness for the plaintiff testified that this battleship type of car was not adapted to the carriage of scrap iron by reason of the greatly enhanced cost of unloading.

It appeared that the scrap iron in Penn car 261461 went to Coatesville, Pa., at which point the consignee, the Midvale Steel & Ordnance Company refused to accept delivery. Subsequently, on orders of the shipper, the car was forwarded to Spring City, and on orders of the shipper the car was returned to Taunton, Mass., consigned to the plaintiff, where it arrived about February 19, 1919, having been all the time in the possession of the carriers, it appeared that when the lading was transferred from the original car into Penn car 261461 all of the fine scrap was loaded on top and mixed in with the other material, the coarser material being the sheet and skeleton scrap being on the bottom, and the bundles and bales of the sheet and skeleton scrap being to a great extent broken so that the lading on its return to Taunton was in a badly mixed up condition and unmarketable. On the return of the car to Taunton, the plaintiff declined to take delivery of the scrap iron. Witnesses for the plaintiff testified that when the car was returned to Taunton the scrap being in a battleship car and being in such a mixed up condition, in view of the then prevailing market price and the carrier charges outstanding on the car it would not pay to take the car and handle it. A salesman employed by The Perry, Buxton, Doane

Company who had had many years' experience in buying and selling scrap iron testified that if the car arrived at Coatesville, Pa., in the mixed up condition which it showed on its return at Taunton, Mass., after having been transferred it would not have paid the original consignee to have unloaded and attempted to handle the scrap iron. According to this witness the consignee and all other mills desired its scrap iron only when done up in sizeable bales or bundles and not mixed up. In the opinion of the witnesses for the plaintiff, the scrap iron in question was worthless after the transfer had been made.

[fol. 17] The plaintiff testified that subsequent to the return of the car to Taunton, the plaintiff paid back to The Perry, Buxton, Doane Company the amount which had been received from that company immediately following the shipment of the car.

The foregoing is all of the evidence material to this report. It is agreed by counsel that the original bill of lading may be used in the argument before the Full Court.

At the close of the evidence I directed a verdict for the defendant, to which the plaintiff excepted. I report the case to the Supreme Judicial Court at the request of the parties and upon their agreement that if the exception to Judge Dubuque's ruling is sustained, or if the Supreme Judicial Court sustains my ruling, the verdict shall stand; if the Supreme Judicial Court overrule the defendant's exceptions to Judge Dubuque's ruling and sustain the plaintiff's exception to my ruling, a verdict for the plaintiff shall be ordered in the sum of $400 which amount was agreed upon by the parties for the purpose of this case in consideration of a collateral agreement respecting the carrier's charges on this car.

Marcus Morton, Justice of the Superior Court.

Oct. 6, 1923.

IN SUPERIOR COURT OF BRISTOL COUNTY

DEFENDANT'S EXCEPTIONS TO REPORT

The plaintiff having an alleged cause of action against the United States Railroad Administration, arising out of or connected with a shipment of freight from Taunton, Mass., to Coatesville, Pa., shipped in December, 1918, not delivered at destination and returned for delivery to the plaintiff at Taunton, brought an action by writ dated January 9, 1920, against the New York, New Haven and Hartford Railroad Company, a Massachusetts corporation.

On September 21, 1922, the plaintiff filed a motion in said proceeding to be allowed to substitute as party defendant in place of The New York, New Haven and Hartford Railroad Company, James C. Davis, Alleged Agent, which motion was allowed. Thereafter, to wit, on October 7, 1922, an order of notice was issued from said Court directing the plaintiff to give notice to said James C. Davis of the pendency of said action and requiring said Davis to appear and answer on the first Monday of November, 1922. Said order

[fol. 18] of notice was served by leaving an attested copy thereof with H. E. Astley, Division Superintendent of said New York, New Haven and Hartford Railroad Company at said Taunton on October 16, 1922. Service on said Astley would have been good service in an action against the N. Y., N. H. and H. R. Co.

Thereafter, to wit, on November 6, 1922, said James C. Davis, the present defendant, appeared specially by counsel and filed a motion to dismiss as follows:

"Now comes James C. Davis defendant herein alleged Agent and Director General appearing specially for the purpose of this motion, and without consenting to the jurisdiction of this Court moves that the service of the writ summoning said defendant to appear and answer be set aside and that this action as against him be dismissed upon the following grounds:

1. That this Court is without jurisdiction to entertain this action against the above named defendant.

2. That the issuance and service of said writ summoning the above named defendant to appear and answer are null and void because in violation of and in conflict with Sec. 206 of the Act of Congress of February 28, 1920, known as the Transportation Act.

3. That this proceeding against the above named defendant was not instituted within the time prescribed by the said section of the Transportation Act.

4. That this action as against the above named defendant was not instituted in the manner provided by the above named section of the Transportation Act.

5. That no service has been made upon said defendant as required by the Transportation Act.

6. That no service has been made upon said defendant in accordance with the provisions of the General Laws of this Commonwealth, and that under said laws this Court has no jurisdiction to entertain this action against said defendant.

7. That the provisions of the General Laws of said Commonwealth under authority of which the above named defendant is summoned as party defendant in this action, if they purport to authorize the proceedings herein, are repugnant to the provisions of the Transportation Act and, therefore, said proceedings are null and void and without authority of law.

8. That it appears from the record of the return on the writ herein issued to the above named defendant that no service of said writ has been made upon the above named defendant in accordance with the provisions of the laws of Massachusetts and, therefore, such service is null and void.

[fols. 19-21] Wherefore, the above named defendant says that he should not be held to answer herein; that the service of the writ

herein should be set aside; and that this action as against him should be dismissed."

Thereafter, to wit, on January 2, 1923, said motion was presented to the Court and was overruled, to which action of the Court the defendant duly excepted.

Wherefore, being aggrieved by the action of the Court in overruling said motion to dismiss, the defendant Davis files this his Bill of Exceptions and prays that the same may be allowed.

James C. Davis, Alleged Agent, by His Attorney A. W. Blackman.

Exceptions allowed. Hugo A. Dubuque, J. S. C.

Copy. Attest: Simeon Borden, Clerk.

[fol. 22] COMMONWEALTH OF MASSACHUSETTS:

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH, AT BOSTON, JAN. 4, 1924

RESCRIPT

In the case of [title omitted], pending in the Superior Court for the County of Bristol,

Ordered, That the Clerk of said Court in said County, make the following entry under said case in the Docket of said Court, viz:

Judgment for the plaintiff in the sum of $400.

By the Court,

Walter F. Frederick, Clerk.

January 4, 1924.

[fols. 23 & 24] Brief Statement of the Grounds and Reasons of the Decision

See opinion on file.

A true copy. Attest:

Edwin L. Barney, Asst. Clerk.

[fol. 25] [File endorsement omitted.]

[fol. 26] IN THE SUPERIOR COURT OF BRISTOL COUNTY

NOTATION AS TO JUDGMENT

And on the fourth day of February A. D. 1924, said L. L. Cohen & Co., Inc. recovered judgment against said James C. Davis, Agent

as aforesaid, the sum of Four hundred dollars ($100) damages and costs of suit taxed at Ninety-three dollars and fifty-five cents ($93.55).

CLERK'S CERTIFICATE

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, Walter Perley Hall, Esquire, Chief Justice of our said Superior Court, at Taunton, in said County of Bristol, this eighteenth day of March in the year of our Lord one thousand nine hundred and twenty-four.

Edwin L. Barney, Clerk. (Seal of the Superior Court.)

SUPERIOR COURT OF BRISTOL COUNTY

DOCKET ENTRIES

Month Entered: February 1920.

No. 2270

L. L. COHEN & CO., INC.,

vs.

JAMES C. DAVIS, Agent

Plaintiffs: L. L. Cohen & Co., Inc., a corporation duly organized by law and having an usual place of business in Taunton, Mass.
Defendants: James C. Davis, Agent.
Action of Contract.
Ad damnum $2,000.
Plaintiff's Counsel: L. Swig, I. Bertman, Taunton, Mass.
Defendant's Counsel: F. A. Farnham, 591 South Station, Boston; A. W. Blackman; A. W. Blackman, specially for J. C. Davis, Agt.
[fol. 27] Entered Feb. 2, 1920. Pl'ff calls jury.

(1) Decl. Feb. 2-20.

(2) Appearance, Feb. 17-20.

(3) Answer, Feb. 17, 1920.

(4) Mo. and aff. under R. 63, Sept. 26, 1922.

(5) Mo. to amend writ and decl. allowed and process ordered to issue: Sept. 21, 1922.

Order of notice, personal, to 1" Mon. Nov. next to James C. Davis, Agent, issued, Oct. 7, 1922.
Serv. ret., Oct 20, 1922.

(6) Special appearance of J. C. Davis, Agent, Nov. 7, 1922.

(7) Mo. to dismiss of J. C. Davis, Agent, Nov. 7, 1922.
Denied, deft. to have ten (10) days in which to answer, Jan. 2-23.
Def'ts' claim of except. & appeal, Jan. 4-23.

(8) Answer, Jan. 4, 1923.
Motion (4) allowed, Jan. 2-23.
Defendant's exceptions (as to overruling mo. #7), Jan. 6-23.
Allowed, March 13, 1923.
Verdict for defendant by direction of court, Sept. 17, 1923.
Report to S. J. C., Oct. 6, 1923.
Judgment for the plaintiff in the sum of $400: Rescript received, January 5, 1924.
Judgment for plaintiff, February 4, 1924.

Damages, $400.00.
Costs, 93.55.

Copy. Attest: Edwin L. Barney, Clerk.

[fol. 28] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

STIPULATION AS TO EXHIBIT FOR THE RECORD

It is stipulated and agreed by and between Arthur W. Blackman, Counsel for Plaintiff in Error, and Louis Swig, Counsel for Defendant in Error, that in order to save expense in the printing of the record herein, the original bill-of-lading used in argument before the Supreme Court of Massachusetts and referred to in the second paragraph on page four of the printed record in that Court, need not be printed in full as a part of the record, but that there shall be printed as part of the record only the third paragraph of Section three of the conditions thereof, which reads as follows:

"Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier, within six months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export), or, in case of failure to make delivery, then within six months (or nine months in case of export traffic), after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery

of the property, or, in case of failure to make delivery, then within [fol. 29] two years and one day after a reasonable time for delivery has elapsed."

Arthur W. Blackman, Counsel for James C. Davis, Agent.
Louis Swig, Counsel for L. L. Cohen & Company, Inc.

[fol. 29½] [File endorsement omitted.]

[fol. 30] IN SUPREME JUDICIAL COURT

[Title omitted]

Argued October 22, 1923

OPINION—Filed January 4, 1924

DE COURCY, J.: On December 13, 1918, the plaintiff shipped from Taunton, Massachusetts, "one carload scrap iron," consigned to Midvale Steel & Ordnance Company, Coatesville, Pennsylvania. A reasonable time for delivery at said destination was not later than two months. The shipment was loaded into a "sideboard flat" car: that is, a flat car open at the top, with wooden sides and ends about four feet in height. The plaintiff placed at one end of the car sheet iron scrap, which was tied up in bundles; at the other end skeleton scrap, so called, which was tied up in bales; and in the middle of the car small particles, known as tack or nail scrap. While the car was in transit and on the lines of the Pennsylvania system, it became reasonably necessary to transfer the contents. The iron was loaded into a battleship hopper car, which, it could be found, was not adapted to the carriage of scrap iron; and in the transfer the fine scrap was loaded on top and mixed in with the other material, so as to render the lading unmarketable and worthless. The consignee refused to accept delivery; and the plaintiff declined to take it on its return to Taunton, about February 19, 1919.

The plaintiff, by writ dated January 9, 1920, brought an action of contract against the New York, New Haven & Hartford Railroad Company, "controlled and operated by the United States Railroad Administration." The plaintiff's motion to substitute James C. Davis, Agent, as party defendant, was allowed in September, 1922. On October 7, 1922, an order of notice issued and was served upon one [fol. 31] Astley, the division superintendent; service on whom would have been good in an action against said railroad company. The defendant Davis appeared specially on November 6, 1922, and filed a motion to dismiss. This motion was denied, subject to the defendant's exception. At the subsequent trial on the merits, the judge directed a verdict for the defendant and reported the case to this court.

As the cause of action in this case arose during Federal control of the railroad, it is now settled that the action should have been

brought against the government and not against the railroad company. Missouri Pacific Railroad v. Ault, 256 U. S. 554. Nominsky v. New York, New Haven & Hartford Railroad, 239 Mass. 254. The contention of the defendant, that the representative of the government cannot be made a party by substitution in any case where the action originally was wrongly brought against the railroad company, is contrary to recent decisions of this court. Aetna Mills v. Director General of Railroads, 242 Mass. 255. Genga v. Director General of Railroads, 243 Mass. 101, 110, 111. Director General of Railroads v. Eastern Steamship Lines, Inc. 245 Mass. 385.

The defendant further contends that in no event can substitution be had later than two years after the end of government control. It is true that § 206 (a) of Transportation Act, 1920 (41 Stat. at Large, 461, provides that after the termination of Federal control, actions, arising out of the operation of the railroad while under such control should be brought "within the periods of limitation now prescribed by the State or Federal statutes but not later than two years from the date of the passage of this Act." But that subsection purports to deal only with the time within which actions may be commenced, where the cause thereof arose during Federal control and no action was brought during that period. In the case at bar, the action was begun January 9, 1920, almost two months before the termination of Federal control. The subsection of the Transportation Act here applicable is 206 (d), which provides that such actions "pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final [fol. 32] judgment, substituting the agent designated by the President under subdivision (a)." This subsection contains no time limitation. De Witt v. New York Central Railroad, 196 N. Y. Supp. 870. Henry v. New York Central Railroad, 204 App. Div. 491, 494. Hanlon v. Davis, 276 Pa. St. 113, 118. Even if § 206 (a) were applicable, the Massachusetts law as to amendments does not regard such substitution as the commencement of a new action, and it would have been within the discretion of the trial court to allow the substitution despite the fact that more than two years had elapsed since the termination of Federal control. Aetna Mills v. Director General of Railroads, supra. Genga v. Director General of Railroads, supra. G. L. c. 231, § 138. In view of the Act of March 3, 1923, amending Transportation Act 1920, § 206, we deem it unnecessary to consider the Act of Congress, February 8, 1899 (U. S. Comp. St. § 1594), limiting the time for substitution of a successor in office. See Sack v. Davis, 245 Mass. 114; Director General of Railroads v. Eastern Steamship Lines, Inc. supra. We are of opinion that the motion to dismiss was denied rightly.

As to the merits: On the facts shown the defendant was responsible for the damage to the shipment unless he was relieved from the common law liability by the terms of the bill of lading, or the damage was due to the act or default of the plaintiff itself. The bill of lading is a receipt of the quantity and description of the goods shipped, and a contract to transport and deliver them as specified

in the instrument. Hastings v. Pepper, 11 Pick. 41. The mere description "one carload scrap iron" did not necessarily import that the contents of the car could be mixed or mingled without damage. The owner as one of the contracting parties had a right to judge for itself what arrangement in the car was best adapted for the carriage of its goods. And, while the defendant presumably might have refused to accept the iron for shipment if not satisfied with the packing and position adopted by the shipper, he did not do so, but accepted the carload with full knowledge on the part of his employees of the nature and arrangement of its contents. Hastings v. Pepper, supra. The manner in which the loose scrap was confined [fols. 33 & 34] between bundles of sheet iron scrap and bales of skeleton scrap might well charge the carrier with notice that the division was not random but made with a definite design, and that he should handle the shipment accordingly. Noble v. American Express Co. 234 Mass. 536. Colbath v. Bangor & Aroostook Railroad, 105 Maine, 379. In fact the plaintiff loaded the car, and presumably it was intended that the consignee, and not the defendant, should unload it. So far as appears the shipment as arranged would have gone through without damage but for an intermediate reloading of this bulky freight, weighing more than a hundred thousand pounds: a reloading which apparently was not contemplated by the parties. There was evidence for the jury that the damage complained of was due to the failure of the defendant to provide a suitable car, or the negligence of the employees in unloading and reloading, or both. Pratt v. Ogdensburg & Lake Champlain Railroad, 102 Mass. 557, 567. And, if the goods were received for shipment in good order, the burden was on the defendant to prove that their damaged condition on arrival was due to causes for which he was not legally responsible. Hastings v. Pepper, supra.

The case should have been submitted to the jury. In accordance with the report judgment is to be entered for the plaintiff in the sum of $400.

So ordered.

L. Swig, for the plaintiff.
A. W. Blackman, for the defendant.

[fol. 35] Reporter's certificate to opinions omitted.

[fol. 36] SUPERIOR COURT OF BRISTOL COUNTY

CLERK'S CERTIFICATE

I, Edwin L. Barney, Clerk of the Superior Court, within and for the County of Bristol, do hereby certify that the papers which are

hereto annexed are a true and complete transcript of the record and proceedings in the case of L. L. Cohen & Company, Inc., the corporation plaintiff vs. James C. Davis, Agent, defendant, a true and attested copy of the report and defendant's exceptions to the Supreme Judicial Court, a true and attested copy of the rescript from the said Supreme Judicial Court and a certified copy of the opinion of the Supreme Judicial Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Taunton, this eighteenth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

Edwin L. Barney, Clerk. (Seal of the Superior Court.)

[fol. 37] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

DEFENDANT'S PETITION FOR WRIT OF ERROR

Now comes James C. Davis, Agent, defendant herein, and says that on the 4th day of February, 1924, this Court entered a judgment against the defendant in favor of the plaintiff, the said judgment having been entered under a rescript from the Supreme Judicial Court, and that in the said judgment and the proceedings had prior thereto in this case, certain errors were committed to the prejudice of the defendant, all of which will appear more in detail from the assignment of errors which is filed with this petition.

Wherefore, the defendant prays for the allowance of a writ of error and such other processes as may cause the same to be corrected by the Supreme Court of the United States.

Arthur W. Blackman, Attorney for the Defendant.

[File endorsement omitted.]

[fol. 38] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

DEFENDANT'S ASSIGNMENT OF ERRORS

James C. Davis, Agent, defendant in the above entitled action, in connection with and as part of his petition for a writ of error filed herein, makes the following assignment of errors, which he avers were committed in the rendition of judgment and proceedings appairing on the record.

I

The Supreme Judicial Court for Massachusetts in holding that the representative of the Federal Railroad Administration can be made

a party by substitution in any case where the action originally was wrongly brought against the railroad corporation is permitting a course of procedure contrary to the terms of General Order 50 and General Order 50 A of the United States Railroad Administration.

II

The Supreme Judicial Court for Massachusetts in permitting the representative of the Government to be made a party by substitution [fol. 39] in an action originally wrongly brought against the railroad corporation was deciding a matter of substance and not of procedure, and was applying the particular policy of the Commonwealth of Massachusetts in relation to a Federal question. This is contrary to the policy of Congress as expressed in the Transportation Act.

III

In holding that, in an action against the Government, the representative of the Government may be made a party by substitution where the action originally was wrongly brought against the railroad corporation, the decision reads into the consent given to sue the Government a permission to proceed in a way not authorized by the consent given.

IV

The decision holds that substitution may not only be had, but that it may be had later than two years after the end of Government control. This is in conflict with the Transportation Act.

V

The decision holds that substitution may be had at a time more than two years and one day after a reasonable time for delivery of the property had elapsed. This holding is in conflict with the uniform bill of lading authorized by the Interstate Commerce Commission and used by the carriers, and is, therefore, in conflict with the Act to Regulate Commerce.

VI

In holding that the representative of the Government can be made a party by substitution in an action originally brought against [fol. 40] the railroad company at a time more than two years after a reasonable time for delivery of the property and at a time more than two years after the passage of the Transportation Act, the Supreme Judicial Court of Massachusetts holds that such substitution is not the commencement of a new action. This is in conflict with the Transportation Act and also with principles of law enunciated by this Court.

VII

In holding that substitution may be had later than two years after the end of Government control, the Supreme Judicial Court of Massachusetts holds that Section 206 (a) of the Transportation Act purports to deal only with the time within which actions may be commenced where the cause of action thereof arose during Federal control and no action whatever was brought during that period. This is in conflict with the Transportation Act which applies to any and all proceedings instituted thereafter against the Government.

VIII

In deciding that the representative of the Government can be made a party by substitution at a time later than two years after the end of Federal control, the Supreme Judicial Court holds that the service as made was lawful and valid. This is in conflict with the Transportation Act.

Wherefore, the defendant prays that the judgment of the Superior Court, entered as aforesaid under the rescript from the Supreme Judicial Court, may be reversed and a judgment rendered in favor of the defendant and for costs.

Arthur W. Blackman, Attorney for Defendant.

[fol. 40½] [File endorsement omitted.]

[fol. 41] WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

(Seal of the United States District Court, Massachusetts.)

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Taunton, within and for the County of Bristol and said Commonwealth, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between L. L. Cohen & Company, Inc., Plaintiff, and James C. Davis, Agent, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United

States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said James C. Davis, Agent, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the tenth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

Allowed by Walter Perley Hall, Chief Justice of the Superior Court of Massachusetts.

[fol. 42] COMMONWEALTH OF MASSACHUSETTS,
Bristol, ss:

And now, here, the Judges of the Superior Court for the Commonwealth of Massachusetts, holden at Taunton, within and for said County of Bristol, make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, Edwin L. Barney, Clerk of said Superior Court, have hereto set my hand and the seal of said court this eighteenth day of March, A. D. 1924.

Edwin L. Barney, Clerk. (Seal of the Superior Court.)

[fol. 43] BOND ON WRIT OF ERROR FOR $500—Omitted in printing

[fol. 44] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

CERTIFICATE OF LODGMENT

I, E. L. Barney, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on March 11, 1924, in the matter of James C. Davis, Agent versus L. L. Cohen & Company, Inc., a corporation,

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Taunton, Massachusetts, this eighteenth day of March 1924.

Edwin L. Barney, Clerk Superior Court of Bristol County, Massachusetts. (Seal of the Superior Court.)

[fol. 45] CITATION—In usual form, showing service on Louis Swig; omitted in printing

Endorsed on cover: File No. 30,209. Massachusetts, Bristol County, Superior Court. Term No. 899. James C. Davis, agent, plaintiff in error, vs. L. L. Cohen & Company, Inc. Filed March 20th, 1924. File No. 30,209.

STPONED TO MERITS
JUN 9 - 1924

Office Supreme Court, U. S.
FILED
MAR 31 1924
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

October Term, 1923.

No. [redacted]331

JAMES C. DAVIS,
PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
RESPONDENT.

Petition for Writ of Certiorari and Brief in Support Thereof.

[illegible] & [illegible] LAW PRINTERS, [illegible]



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Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 899.

JAMES C. DAVIS,
PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
RESPONDENT.

NOTICE.

To LOUIS SWIG, ESQUIRE,
Counsel for Respondent.

Sir: Please take notice that on Monday, the 28th day of April, 1924, upon the opening of the Court, or as soon thereafter as counsel can be heard, the foregoing petition and brief, together with a certified copy of the entire transcript of the record of the case, will be presented and submitted to the Supreme Court of the United States, in its court room in the Capitol at Washington, D.C., in pursuance of its rules, in such cases made and provided.

Dated this 22d day of March, 1924.

ARTHUR W. BLACKMAN,
Counsel for Petitioner.

Due service of the foregoing notice, together with a copy of the petition for a writ of certiorari, and brief in support thereof, is hereby acknowledged.

LOUIS SWIG,
Counsel for Respondent.

Taunton, Mass., March 25, 1924.

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 899.

JAMES C. DAVIS, AGENT,
PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James C. Davis, Agent, respectfully presents to this Court this his petition for a writ of certiorari addressed to the Superior Court of the Commonwealth of Massachusetts, commanding such Court and the clerk thereof to certify to this Court the record and proceedings of the case in said Court, wherein your petitioner was defendant and the respondent, L. L. Cohen & Company, Inc., a corporation of the Commonwealth of Massachusetts, was plaintiff, together with the opinion therein of the Supreme Judicial Court for the Commonwealth of Massachusetts, for the review and determination of said cause by this Court.

In this behalf, your petitioner states the following facts:

This action was brought by the respondent in said Superior Court for the County of Bristol to recover for damage to a carload of scrap iron shipped in interstate commerce by the respondent in December, 1918. Your petitioner was, on March 28, 1921, appointed by the President of the United States the agent under the Transportation Act.

The respondent began its action by writ dated January 9, 1920, against The New York, New Haven and Hartford Railroad Company, a Massachusetts corporation and a carrier in interstate commerce, whose railroad was taken over and operated by the Federal Government in accordance with the Proclamation of the President of the United States dated December 26, 1917.

On September 21, 1922, the respondent herein moved that it be allowed to substitute as party defendant, in place of The New York, New Haven and Hartford Railroad Company, your petitioner as alleged agent, which motion was allowed. Thereafter, on October 7, 1922, an order of notice was issued from said Court directing the plaintiff below, respondent herein, to give notice to your petitioner of the pendency of said action and requiring your petitioner to appear and answer on the first Monday of November, 1922. Said order of notice was served upon a division superintendent of said The New York, New Haven and Hartford Railroad Company on October 16, 1922. Service upon said division superintendent would have been a good service in an action against said The New York, New Haven and Hartford Railroad Company.

Thereafter in due course your petitioner appeared specially by counsel and filed a motion to dismiss, alleging that the Court had no jurisdiction over your petitioner. Your petitioner's motion to dismiss set forth that the Court was without jurisdiction to entertain the action against your petitioner, the defendant below; that the issuance and service of the writ were null and void because in violation of and in conflict with section 206 of the Act of Congress of February 28, 1920, known as the Transportation Act; that the proceeding against your petitioner was not instituted within the time prescribed in said Transportation Act; that said proceeding was not instituted in the manner provided by said Transportation Act; that no service had been made upon your petitioner as required by the Transportation Act; that Massachusetts laws, under the authority of which your petitioner was summoned in as party defendant in this action, if held to authorize such proceedings, were repugnant to the provisions of the Transportation Act, and, therefore, null and void; and prayed that the service of the writ be set aside and the action as against your petitioner be dismissed.

Your petitioner's said motion to dismiss was, on January 2, 1923, overruled, and said action of the Court thereon became the subject of your petitioner's bill of exceptions to the Supreme Judicial Court for the Commonwealth of Massachusetts.

After your petitioner's motion to dismiss was overruled, your petitioner was required to answer, and in due course did so, again objecting to the jurisdiction of the Court over him, and among other defenses alleging that the plaintiff's alleged cause of action arose in connection with a shipment of freight in inter-

state commerce in December, 1918; that a reasonable time for delivery of said shipment was not later than two months thereafter; that said shipment of freight was made under and in pursuance with the terms and conditions of a bill of lading, one of the conditions of which required that suits for loss, damage, or delay must be brought not later than two years and one day after the lapse of a reasonable time for delivery; and that the plaintiff's proceeding against your petitioner was not begun within the time so prescribed by the terms of the bill of lading.

The action was subsequently tried upon the merits, and at the close of the evidence the trial court directed a verdict for your petitioner, the defendant therein, and reported the case on request of the parties to the Supreme Judicial Court for the Commonwealth of Massachusetts. Said report of the case was argued before the said Court together with your petitioner's exceptions raising the question of jurisdiction. The said Supreme Judicial Court of Massachusetts reversed the decision of the trial court on the merits, sustained the order of the trial court overruling your petitioner's motion to dismiss, and directed the Superior Court of the Commonwealth of Massachusetts to enter judgment for the plaintiff below, the respondent herein.

The reasons relied on for the issuance of said writ and upon which your petitioner believes the writ ought to be issued are as follows:

I.

The Supreme Judicial Court for Massachusetts, in holding that the representative of the Federal Rail-

road Administration can be made a party by substitution in any case where the action originally was wrongly brought against the railroad corporation, is permitting a course of procedure contrary to the terms of General Order 50 and General Order 50-A of the United States Railroad Administration.

II.

The Supreme Judicial Court for Massachusetts, in permitting the representative of the Government to be made a party by substitution in an action originally wrongly brought against the railroad corporation, was deciding a matter of substance and not of procedure, and was applying the particular policy of the Commonwealth of Massachusetts in relation to a Federal question. This is contrary to the policy of Congress as expressed in the Transportation Act.

III.

In holding that, in an action against the Government, the representative of the Government may be made a party by substitution where the action originally was wrongly brought against the railroad corporation the decision reads into the consent given to sue the Government a permission to proceed in a way not authorized by the consent given.

IV.

The decision holds that substitution may not only be had, but that it may be had later than two years after the end of Government control. This is in conflict with the Transportation Act.

V.

The decision holds that substitution may be had at a time more than two years and one day after a reasonable time for delivery of the property had elapsed. This holding is in conflict with the uniform bill of lading authorized by the Interstate Commerce Commission and used by the carriers, and is, therefore, in conflict with the Act to Regulate Commerce.

VI.

In holding that the representative of the Government can be made a party by substitution in an action originally brought against the railroad company at a time more than two years after a reasonable time for delivery of the property and at a time more than two years after the passage of the Transportation Act, the Supreme Judicial Court of Massachusetts holds that such substitution is not the commencement of a new action. This is in conflict with the Transportation Act and also with principles of law enunciated by this Court.

VII.

In holding that substitution may be had later than two years after the end of Government control, the Supreme Judicial Court of Massachusetts holds that section 206 (*a*) of the Transportation Act purports to deal only with the time within which actions may be commenced where the cause of action thereof arose during Federal control and no action whatever was brought during that period. This is in conflict with the Transportation Act, which applies to any and all proceedings instituted thereafter against the Government.

VIII.

In deciding that the representative of the Government can be made a party by substitution at a time later than two years after the end of Federal control, the Supreme Judicial Court holds that the service as made was lawful and valid. This is in conflict with the Transportation Act.

IX.

The decision of the Supreme Judicial Court of Massachusetts is in conflict with other decisions of State Courts and with decisions of the lower Federal Courts and is believed to be in conflict with recent decisions of this Court. This case is a test case, the determination of which by this Court will govern the conduct of parties in many other cases pending in the Commonwealth of Massachusetts and elsewhere.

ARTHUR W. BLACKMAN,
Counsel for JAMES C. DAVIS, Agent.

STATE OF MASSACHUSETTS, COUNTY OF BRISTOL, ss.

ARTHUR W. BLACKMAN, being first duly sworn, on oath deposes and says that he is the counsel for petitioner, James C. Davis, Agent; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts

in said petition herein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 28th day of March, 1924.

EDWARD C. BARKER,
[seal] Notary Public in and for
the State of Massachusetts.
My commission expires January 19, 1928.

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and that the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

ARTHUR W. BLACKMAN,
Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 899.

JAMES C. DAVIS, AGENT,
PETITIONER,
v.
L. L. COHEN & COMPANY, INC.,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petition for a writ of certiorari accompanies a writ of error in the case of *James C. Davis, Agent, Plaintiff in Error,* v. *L. L. Cohen & Company, Inc., Defendant in Error,* and is filed for the purpose of obtaining a review in the event that this Court should hold that the case was not properly before the Court on the writ of error.

A.

AUTHORITY FOR THE ISSUANCE OF THE WRIT.

A Federal question is presented because this case involves the right of the respondent, plaintiff below, to recover for damage to an interstate shipment, which moved during the period of Federal control of carriers. The petitioner's motion to dismiss objected to the Court's jurisdiction over him because the proceedings were in violation of the Act of Congress, February 28, 1920, known as the Transportation Act,

and the petitioner's answer thereafter filed, in addition pleaded in bar to the action the requirement in the bill of lading that suit should be brought within two years and one day from delivery of the shipment.

If this Court should hold that the cause is not properly before the Court on the writ of error, then a review may be had on a writ of certiorari on the ground that the decision of the State Court was against the Federal rights claimed by the petitioner under the Interstate Commerce Act and under the Transportation Act, and the petition may be allowed under section 237 of the Judicial Code.

B.

The State Court Erred in Holding that the Respondent could Recover.

(1) *The substitution of the petitioner as party defendant was the beginning of a new cause of action.*

The so-called amendment in the proceedings below was not a mere expansion or amplification of what was alleged in support of the cause of action already asserted, nor did it relate back to the commencement of the action.

> *Atlantic Coast Line Railroad Company* v. *Burnette*, 239 U.S. 199, 201.
>
> *Seaboard Air Line Railway* v. *Renn*, 241 U.S. 290, 293.
>
> *Union Pacific Railroad Company* v. *Wyler*, 154 U.S. 285.

As respondent's right to sue was given by Act of Congress, and the amendment brought in a new party, the amendment in the Court below was both a depar-

ture from law to law and the assertion of a new cause of action.

Union Pacific Railroad Company v. *Wyler*, 154 U.S. 285.
United States v. *McCord*, 233 U.S. 157.

(2) *The running of the limitation in the bill of lading was not arrested as to the petitioner.*

As the petitioner did not become a defendant before October, 1922, and as the petitioner represents the Federal Government and not the original corporate defendant, the petitioner may set up the bill-of-lading provision requiring suit to be brought within two years and one day after delivery of the property.

Union Pacific Railroad Company v. *Wyler*, 154 U.S. 285.
Alexander v. *Pendleton*, 8 Cranch, 462.
Sicard v. *Davis*, 6 Peters, 124.
United States v. *Dalcour*, 203 U.S. 408.

(3) *There is no authority in Federal law for the substitution.*

General Order 50 of the Director General, dated October 28, 1918 (U.S. R.R. Administration Bulletin No. 4, p. 334), was in effect at the time the respondent's action was begun, and was mandatory. The respondent's original proceeding was therefore improperly brought and could avail it nothing.

Missouri Pacific Railroad Company v. *Ault*, 256 U.S. 554.

The bringing in of the petitioner by amendment to an action erroneously brought was not permissible where the right to maintain the action against the

Federal Government is a right granted by the sovereign.

Rock Island, Arkansas & Louisiana Railroad Company v. *United States*, 254 U.S. 141, 143.
United States v. *McCord*, 233 U.S. 157.

In the latter case, which involved the statute giving creditors of a contractor for the United States the right to sue in the name of the United States upon the contractor's bond, and authorized the intervention of other creditors, this Court said:

> "These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit."

Not only is there no authority in the Transportation Act for the substitution of the agent in cases erroneously brought, but also the amendment to the Transportation Act, passed March 3, 1923, known as the Winslow Act, expressly authorized substitution of the Agent or Director General only in actions properly commenced. This failure of Congress to authorize substitution in cases erroneously brought shows that all along it has been the intent of Congress not to permit substitution in such situations.

Respectfully submitted,
ARTHUR W. BLACKMAN,
Counsel for
JAMES C. DAVIS, AGENT, Petitioner.

Office Supreme Court, U. S.
FILED
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Supreme Court of the United States.

October Term, 1924.

No. 331.

JAMES C. DAVIS, AGENT,
PLAINTIFF IN ERROR AND PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
DEFENDANT IN ERROR AND RESPONDENT.

ON WRIT OF ERROR AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS.

Brief for Plaintiff in Error and Petitioner.

ARTHUR W. BLACKMAN,
Counsel for James C. Davis, Agent,
Plaintiff in Error,
Petitioner for Certiorari.

Davis v. Ind. Commission

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON

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Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 331.

JAMES C. DAVIS, AGENT,
Plaintiff in Error and Petitioner,
v.
L. L. COHEN & COMPANY, INC.,
Defendant in Error and Respondent.

ON WRIT OF ERROR AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR AND PETITIONER.

Statement of the Case.

This case comes here on a writ of error and on petition for certiorari to the Superior Court of the Commonwealth of Massachusetts to review a judgment in favor of the defendant in error and respondent entered in said Superior Court in accordance with a rescript to said Superior Court from the Supreme Judicial Court of the Commonwealth of Massachusetts.

The defendant in error and respondent, by writ dated January 9, 1920 (Rec. p. 2), began an action in contract in said Superior Court for Bristol County, Commonwealth of Massachusetts, against The New York, New Haven and Hartford Railroad Company, a common-carrier corpora-

tion, to recover damages to a shipment of a carload of scrap-iron which had been shipped by the said plaintiff from Taunton, Massachusetts, in December, 1918, to a point in Pennsylvania. The shipment was not delivered to the consignee, and was returned to the shipper at Taunton, Massachusetts, in February, 1919 (Rec. p. 3). The defendant corporation duly appeared and answered (Rec. p. 4).

No further proceedings were had until in September, 1922, when the plaintiff below moved to amend its writ and declaration by striking out the name of the original defendant, The New York, New Haven and Hartford Railroad Company, and substituting in place therefor James C. Davis, Agent and Director General of Railroads, as party defendant (Rec. p. 4). Said motion was allowed in October, 1922, and an order of notice was issued and service thereof made upon a division superintendent of the carrier corporation (Rec. p. 5).

Thereafter, in November, 1922, counsel for said Davis, alleged agent, filed a special appearance for the purpose of contesting jurisdiction (Rec. p. 6), and also a motion to dismiss (Rec. p. 7), upon the following grounds:

1. That this Court is without jurisdiction to entertain this action against the above-named defendant.

2. That the issuance and service of said writ summoning the above-named defendant to appear and answer are null and void, because in violation of and in conflict with section 206 of the Act of Congress of February 28, 1920, known as the Transportation Act.

3. That this proceeding against the above-named defendant was not instituted within the time prescribed by the said section of the Transportation Act.

4. That this action as against the above-named defendant was not instituted in the manner provided by the above-named section of the Transportation Act.

5. That no service has been made upon said defendant as required by the Transportation Act.

6. That no service has been made upon said defendant in accordance with the provisions of the General Laws of this Commonwealth, and that under said laws this Court has no jurisdiction to entertain this action against said defendant.

7. That the provisions of the General Laws of said Commonwealth under authority of which the above-named defendant is summoned as party defendant in this action, if they purport to authorize the proceedings herein, are repugnant to the provisions of the Transportation Act, and therefore said proceedings are null and void and without authority of law.

8. That it appears from the record of the return on the writ herein issued to the above-named defendant that no service of said writ has been made upon the above-named defendant in accordance with the provisions of the laws of Massachusetts, and therefore such service is null and void.

Said motion to dismiss filed by plaintiff in error and petitioner herein was denied, and said denial duly became the subject of a bill of exceptions to the Supreme Judicial Court of Massachusetts (Rec. pp. 12-14).

Thereafter, plaintiff in error and petitioner herein, James C. Davis, not waiving his motion to dismiss and not admitting the jurisdiction of the Court over him, and in pursuance of an order of Court, filed an answer to the merits (Rec. p. 8), setting up as one ground of defense the claim that, as required by the terms of the bill of lading, the suit as against him was not begun within two years and one day after a reasonable time for delivery of the property had elapsed, because, although delivery of shipment was tendered in February, 1919, the action as against said Davis was not begun before October, 1922 (Rec. p. 16).

Subsequently the action was tried to a jury, at the end of which the trial judge directed a verdict for the Federal Agent Davis, defendant therein and plaintiff in error and

petitioner herein. The trial judge, in accordance with Massachusetts practice, reported the case to the Supreme Judicial Court of Massachusetts, the report embodying the answer of the defendant Davis and a statement of the facts (Rec. pp. 9-12).

The opinion of the Supreme Judicial Court (Rec. pp. 17-19) sustained the lower Court in denying the motion to dismiss, and held that the direction of a verdict for the defendant below at the trial on the merits was wrong. In so deciding the Supreme Judicial Court followed earlier decisions in that Court, and held that the Federal Agent as representative of the United States Railroad Administration could be made a party by substitution in an action which originally was wrongly brought against a corporate carrier; held that such substitution could be made at a time later than two years after the end of Government control of carriers; held that the action as against the representative of the Government was begun, not when said representative was substituted, but when the original action was begun against the corporation, and was therefore not barred by the two-year provision as to suit contained in the bill of lading.

Specification of Errors Relied On.

It is respectfully urged that this judgment of the Superior Court of Bristol County of the Commonwealth of Massachusetts should be reversed, for the following reasons:

1. The Supreme Judicial Court for Massachusetts, in holding that the representative of the Federal Railroad Administration can be made a party by substitution in any case where the action originally was wrongly brought against the railroad corporation, is permitting a course of procedure contrary to the terms of General Order 50 and General Order 50-A of the United States Railroad Administration.

2. The Supreme Judicial Court for Massachusetts, in permitting the representative of the Government to be made a party by substitution in an action originally wrongly brought against the railroad corporation, was deciding a matter of substance and not of procedure, and was applying the particular policy of the Commonwealth of Massachusetts in relation to a Federal question. This is contrary to the policy of Congress as expressed in the Transportation Act.

3. In holding that, in an action against the Government, the representative of the Government may be made a party by substitution where the action originally was wrongly brought against the railroad corporation, the decision reads into the consent given to sue the Government a permission to proceed in a way not authorized by the consent given.

4. The decision holds that substitution may not only be had, but that it may be had later than two years after the end of Government control. This is in conflict with the Transportation Act.

5. The decision holds that substitution may be had at a time more than two years and one day after a reasonable time for delivery of the property had elapsed. This holding is in conflict with the uniform bill of lading authorized by the Interstate Commerce Commission and used by the carriers, and is therefore in conflict with the Act to Regulate Commerce.

6. In holding that the representative of the Government can be made a party by substitution in an action originally brought against the railroad company at a time more than two years after a reasonable time for delivery of the property and at a time more than two years after the passage of the Transportation Act, the Supreme Judicial Court of Massachusetts holds that such substitution is not the commencement of a new action. This is in conflict with the Transportation

Act and also with principles of law enunciated by this Court.

7. In holding that substitution may be had later than two years after the end of Government control, the Supreme Judicial Court of Massachusetts holds that section 206 (a) of the Transportation Act purports to deal only with the time within which actions may be commenced where the cause of action thereof arose during Federal control and no action whatever was brought during that period. This is in conflict with the Transportation Act, which applies to any and all proceedings instituted thereafter against the Government.

8. In deciding that the representative of the Government can be made a party by substitution at a time later than two years after the end of Federal control, the Supreme Judicial Court holds that the service as made was lawful and valid. This is in conflict with the Transportation Act.

Questions Involved.

Substantially the questions involved herein relate to the power of the State Court to substitute the representative of the United States Railroad Administration in a pending action originally brought against a carrier corporation for a cause of action arising out of the possession and operation by the President of the railroads of the country. These questions may be stated:

1. Whether there is any power at all to make the substitution;

2. Assuming the power to substitute, whether the substitution can be made "later than two years from the date of passage of" the Transportation Act;

3. Assuming the power to substitute, whether the substitution can be made after the lapse of the two-

year-and-one-day period for bringing suit prescribed by the conditions of the bill of lading;

4. Whether the substitution of the Federal Agent was the beginning of a new cause of action as to him; and—

5. Whether the provisions of the Massachusetts statutes purporting to authorize the substitution of parties in pending actions as construed by the Massachusetts Court are repugnant to the provisions of the Transportation Act.

Argument.

I. THE STATE COURT HAD NO POWER AT ALL TO MAKE A SUBSTITUTION WHERE THE ACTION WAS BEGUN ERRONEOUSLY.

(1) *Summary of legislation authorizing suits.*

From the beginning of Federal control to the passage of the Federal Control Act there was no explicit direction concerning the title or description of the defendant against whom suit should be brought, although the President in his proclamation December 26, 1917 (40 St. L. part II, 1733), provided that "suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

On March 21, 1918, the Federal Control Act (40 St. L. 451, c. 25) became effective. Section 10 of this Act in part is as follows:

> "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers

and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. . . ."

The Director General of Railroads on October 28, 1918, issued General Order 50 (U.S. R.R. Administration Bulletin #4, p. 334), which in part read as follows:

> "IT IS THEREFORE ORDERED, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, *shall be brought** against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures. . . .
>
> "The pleadings *in all such actions* at law, suits in equity, or proceedings in admiralty, *now pending* against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom. . . ."

(General Order 50-A, dated January 11, 1919, amended General Order 50 by striking out the name of William G.

*All italics in this brief are those of counsel.

McAdoo, so that actions at law, etc., were to be brought against the Director General of Railroads without specifying him by name.)

From the date of the Federal Control Act and by the provisions of that Act action properly was to be brought against the "carriers." This meant the Director General of Railroads. However, until General Order 50 was issued, it was perhaps natural to name the corporate carrier as defendant. From the date of General Order 50, however, the doubt was cleared away, as that order provided that actions, etc., "shall be brought against" the Director General by name.

Missouri Pacific R. Co. v. *Ault*, 256 U.S. 554.

No further changes were made until the carriers were returned to their owners as provided for by the Transportation Act (Act of Febuary 28, 1920; 41 St. L. 456, c. 91). The pertinent provisions of section 206 of this Act as passed are as follows:

> "Sec. 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) *of such character as prior to Federal control could have been brought against such carrier*, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction

of the cause of action had it arisen against such carrier; . . .

"(d) Actions, suits, proceedings, and reparation claims, *of the character above described pending* at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a). . . ."

Finally, as a result of the action of this Court in dismissing *Payne* v. *Industrial Board*, 258 U.S. 613; *Payne* v. *Stevens*, 260 U.S. 705; and *United States Railway Administration* v. *Slatinka*, 260 U.S. 747, the Winslow Act was passed (March 3, 1923, c. 233; 42 St. L. 1443), which added paragraphs (h) and (i), in part as follows:

"(h) Actions, suits, proceedings, and reparation claims, of the character described in subdivision (a), (c), or (d), *properly commenced* within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the Act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award the agent designated by the President then in office. . . .

"(i) Orders providing for a substitution *in such cases* made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (h) which

have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect."

(2) *The plaintiff below, defendant in error and respondent herein, did not bring itself within the permission granted.*

The original action here was begun in January, 1920, against a railroad corporation, and not against a representative of the United States Railroad Administration. General Order 50 had been in effect more than a year. The action, therefore, was improperly begun.

Missouri Pacific R. Co. v. *Ault*, 256 U.S. 554.

No authority for the method here pursued can be found in any of the Federal statutes or the General Orders of the Director General, which are the source of any right the plaintiff below may have had to bring its action. Section 10 of the Federal Control Act gives no authority at all for substitution. It specifically provided that liabilities of common carriers under Federal control should be subject to any order of the President.

Nor do the provisions of General Order 50 furnish any authority for the substitution which was made in the case at bar. Not only did General Order 50 require suit to be brought against the Director General, but the only substitution allowed was in actions, etc., then *pending*.

The Transportation Act as originally passed in no way helps the defendant in error and respondent herein, plaintiff below. The provision therein relative to substitution of the Federal Agent is carefully limited to substitution in actions, etc., "*of the character above described*," which are "*pending*" at the end of Federal control. Obviously the phrase "of the character above described" refers to

actions, etc., set forth in sub-paragraph (a), that is, actions "of such character as prior to Federal control could have been brought against such carrier."

Finally, the last legislation on the subject was by the Act of March 3, 1923, adding two paragraphs to the Transportation Act. Here also the matter of substitution was the subject of legislation by Congress. But the permission to substitute was granted only where the actions, etc., had been "*properly commenced within the period of limitation prescribed.*" Although the Winslow Act was passed after the substitution was attempted in the case at bar and has no relevancy to the issues in the present case, nevertheless, it would seem as if Congress, when it had the question of substitution before it, would have provided specifically for substitution in cases improperly begun had it been the desire of Congress to permit substitution in such cases. It is a fair inference from the passage of the Winslow Act that in none of its legislation did Congress intend to broaden the rights of litigants and permit substitution in actions improperly commenced.

(3) *The United States may not be sued without its consent, and statutes granting that consent will be most strictly construed.*

What was the effect of Federal control of the carriers appears now to be fairly well settled. The United States took over a complete and not a divided control of the railroad systems and operated them directly. It is also settled that actions, etc., against the Railroad Administration were suits against the United States, which was the real party in interest.

Northern Pacific Ry. Co. v. *North Dakota*, 250 U.S. 135.

Missouri Pacific R. Co. v. *Ault*, 256 U.S. 554.

Alabama & Vicksburg R. Co. v. *Journey*, 257 U.S. 111.

Director General v. *Kastenbaum*, 263 U.S. 25.
E. I. DuPont de Nemours & Co. v. *Davis*, 264 U.S. 456.

In *Davis* v. *O'Hara*, decided by this Court November 24, 1924, it was said:

> "The General Orders are, in legal effect, the orders of the President, and are valid. This is an action against the United States. The railroads were taken over and operated by it in its sovereign capacity, and it will not be held to have waived any sovereign right or privilege unless it has plainly done so [citing cases]. Its immunity from suit was waived only to the extent indicated by the statute and orders of the Director General."

In *E. I. DuPont de Nemours & Co.* v. *Davis*, *supra*, p. 462, this Court said:

> "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain' [citing cases]; and it may not be held to have waived any sovereign right or privilege unless plainly so provided."

See also *Davis* v. *Corona Coal Co.*, 265 U.S. 219.

It is not necessary to cite authorities at length to the rule of strict construction where the sovereign grants rights of action where none existed before. One or two cases illustrate the principle clearly. In *United States, ex rel. Texas Portland Cement Co.*, v. *McCord*, 233 U.S. 157, there was involved an Act of Congress giving creditors of a contractor for the United States a right to sue in the name of the United States upon the contractor's bond if the United States itself did not bring suit within six months. The United States there brought no suit, and stated that

it was not going to. In holding that the action would not lie, as prematurely brought, when begun within six months, this Court said:

> "The statute thus creates a new liability and gives a special remedy first, and upon well settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself."

After the six months within which the United States might bring action had elapsed and within the twelve months within which suit must be brought, another creditor intervened in the original proceeding by filing a complete bill, which purported to be for the benefit of all creditors, etc. As to this proceeding the Court said, p. 163:

> "The right to intervene is given in the statute when the action is brought by the United States, and the creditors may have their rights adjudicated in such action. And in the case of an action begun by a creditor in accordance with the statute, the right to file a claim is given to creditors. These rights to intervene and to file a claim, conferred by the statute, *presuppose an action duly brought under its terms.* In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. *The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit.* No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate [from the Circuit Court of Appeals], the intervention was what it purported to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit."

So it has been held that, in suits against the Government where a personal action has been brought against some officer thereof, substitution of his successor is not permitted except where a statute expressly allows it.

Pullman Co. v. *Croom*, 231 U.S. 571.

And this Court has held also that, even where such substitution was authorized by statute, it could be allowed only where a suit had been lawfully commenced against the officer.

Smietanka v. *Indiana Steel Co.*, 257 U.S. 1.

While there has been, so far as counsel is advised, no decision by this Court of the question now presented, this Court denied a petition for certiorari in *Fischer* v. *Wabash Railroad et al.*, 263 U.S. 706. The action originally was brought in the Supreme Court of New York in January, 1922, against certain corporate carriers. In March, 1922, the defendants filed answers setting up the fact of Federal control. Thereafter the plaintiff sought to substitute the Federal Agent as defendant. The trial Court's denial of this application was affirmed by the Appellate Division and later by the Court of Appeals (235 N.Y. 568).

The question of procedure in suits against the Railroad Administration has come before the lower Courts of the country in many cases and has been decided variously. It does not seem worth while to refer to them. Generally the Federal Courts have adopted a rule of strict construction as appears from *Davidson* v. *Payne* (C.C.A. 8th Circuit), 289 Fed. 69, and *Whalen Paper & Pulp Mills* v. *Davis* (Ct. of Appeals, D.C.), 288 Fed. 438.

In *Davidson* v. *Payne* action was begun April 21, 1921, and the Court took judicial notice that Payne resigned March 28, 1921, saying:

"This is not a case where the plaintiff has failed to move the substitution of the successor of the defen-

dant Payne as agent within 12 months from the date of his resignation. It is a case where John Barton Payne has been sued as such agent after he had resigned *the office and after his successor,* Davis, had been appointed. Since his resignation on March 28, 1921, John Barton Payne has had no authority to represent the President of the United States in any litigation arising out of the operation of railroads during the World War. Appellant brought suit against the wrong party, and must abide the consequences of his mistake."

In *Whalen Paper & Pulp Mills* v. *Davis* the action was for damage to a freight shipment from Texas to Canada and was begun in the District of Columbia by personal service on the defendant. Referring to the provisions of section 206 of the Transportation Act, and the method of serving process, the Court said:

"The latter provisions, like their predecessors, were designed as authoritative provisions for the regulation of such litigation, and like them were mandatory in character. Accordingly the mode of service attempted in this case was unauthorized and was rightly set aside.

"These conclusions, furthermore, are consistent with the fair import of the language of paragraph (b), for where permission is granted under certain express conditions to serve process in a given manner, it is thereby implied that the authority cannot be exercised under opposite conditions. . . .

"It will be understood, of course, that the foregoing reasons all rest finally upon the conceded rule that, when the United States consents to be sued, the method of procedure prescribed by Congress as part of the consent must be strictly followed, in order to secure jurisdiction; for in such case the remedy of the suitor

depends wholly upon the Government's consent, and it cannot be enlarged beyond the clear terms thereof. This rule applies also where a particular method of serving process is pointed out by the statute [citing cases]."

II. Assuming the general power in the State Court to substitute the Federal Agent, nevertheless the substitution was the beginning of a new cause of action as to him, and therefore had to be made before any period of limitation had expired.

(1) The granting in the trial Court of the motion to substitute James C. Davis, Agent, as the sole party defendant in the place of the carrier corporation worked an entire change of the party defendant. The defendant in error, plaintiff below, brought suit against the wrong party, and should abide the consequences of its mistake. The provisions of law as to bringing suits were designed as authoritative provisions for the regulation of litigation and were mandatory in character. These provisions imposed conditions on the exercise of a privilege granted by Congress. The amendment allowed in the Court below brought in a new party, and was both a departure from law to law and the assertion of a new cause of action. The amendment was not a mere expansion or amplification of what was alleged in support of the cause of action already asserted, and it did not and could not relate back to the commencement of the action.

Union Pacific R. Co. v. *Wyler*, 158 U.S. 285, 295-297.
United States v. *Dalcour*, 203 U.S. 408, 423.
Seaboard Air Line Ry. Co. v. *Renn*, 241 U.S. 290, 293.

It seems clear that such is in fact the case. In the first place, the parties defendant in the Court below were wholly

separate and distinct entities. The carrier corporation in no respect represented the United States Railroad Administration. During the period of Government control, when the alleged cause of action accrued, the interests of the parties were in fact adverse. The carrier corporations, as the Court well knows, maintained during the period of Federal control their separate corporate organizations. The employees of the Railroad Administration were employees of the Federal Government, and as such were not subject to State income taxes, and the carrier corporations made claims upon the Federal Government and were paid for damages or losses resulting from Federal operation.

In the second place, the cause of action against the Railroad Administration was separate and distinct from that set forth in the declaration filed by the plaintiff below (Rec. p. 3). The cause of action first asserted arose out of the liability of a common carrier at common law, as changed, perhaps, by the provisions of the Carmack Amendment to the Interstate Commerce Act. But the right to proceed against the Federal Government for a cause of action arising out of Federal control of carriers is derived from an altogether different source. The plaintiff below could not proceed without invoking and relying upon the permission granted to sue the Federal Government.

So far as counsel is advised, this Court has not passed on this question except indirectly. On October 22, 1923, this Court denied a petition for a writ of certiorari in *Chrisp* v. *Davis*, 263 U.S. 710. Suit there was begun in Arkansas against the Missouri Pacific Railway Company for injuries received while engaged in interstate commerce during the period of Federal control. The original action was begun within two years from the date of the accident. After two years had expired a demurrer to the action was sustained on the ground that the corporation was not liable for injuries accruing during Federal control. The plaintiff thereafter procured an order substituting the Federal Agent as

defendant, and to that the statute of limitations was pleaded. The Supreme Court of Arkansas, reversing the trial Court, held that the substitution was equivalent to the bringing of a new suit, and that the statute of limitations was a bar.

(2) If the premise be correct, it follows that the right of action was barred when in October, 1922, the substitution was attempted. This is true for two reasons, first, because the provisions of the Transportation Act required actions to be begun not later than two years after the termination of Federal control, and, second, because the conditions of the bill of lading required action to be begun within two years and one day after delivery of the property or after a reasonable time for delivery has elapsed. The latter date, as appears from the opinion of the Supreme Judicial Court of Massachusetts (Rec. p. 17), was in February, 1919.

III. MASSACHUSETTS GENERAL LAWS, CHAPTER 231, SECTIONS 51 AND 138, AS CONSTRUED BY THE STATE COURT, ARE REPUGNANT TO FEDERAL LAWS, PARTICULARLY THE PROVISIONS OF THE TRANSPORTATION ACT.

Massachusetts General Laws, c. 231, secs. 51 and 138, are as follows:

> "SECTION 51. The court may, at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enable the defendant to make a legal defence."
>
> "SECTION 138. The cause of action shall be considered to be the same for which the action was brought,

> if the court finds it to be the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed; and the allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action. But no subsequent attaching creditor or purchaser of property attached or bail or any person other than the parties to the record shall be bound by such allowance unless he has had due notice of the application for leave to amend and opportunity to be heard thereon, according to an order of notice to that effect to be issued by the court upon application of the plaintiff, and such third parties shall have the right of exception or appeal."

In its opinion (Rec. p. 18) the Supreme Judicial Court construed subsection (a) of section 206 of the Transportation Act, and held that "that subsection purported to deal only with the time within which actions might be commenced where the cause thereof arose during Federal control and no action was brought during that period," but that, when a suit was begun, though against a wrong party, the plaintiff's rights were saved. The State Court therefore held that subsection (d) of section 206 of the Transportation Act permitted substitution in actions pending at termination of Federal control, whether rightly or wrongly commenced. So far the decision was a construction of the Transportation Act which properly should come before this Court by petition for a writ of certiorari.

But the Supreme Judicial Court of Massachusetts, not content with its construction of the Transportation Act, proceeded to construe the State statute as to amendments, and stated (Rec. p. 18):

> "Even if section 206 (a) were applicable, the Massachusetts law as to amendments does not regard such substitution as the commencement of a new action, and

> it would have been within the discretion of the trial court to allow the substitution despite the fact that more than two years had elapsed since the termination of Federal control."

In support of this opinion, it cited two prior decisions, wherein it had passed upon the same question. In *Aetna Mills* v. *Director General of Railroads*, 242 Mass. 255, 258, it held that the substitution was lawful and in accordance with the practice in Massachusetts. Massachusetts General Laws, c. 231, secs. 138 and 51, were quoted. So in *Genga* v. *Director General of Railroads*, 243 Mass. 101, 104, the Court treated the question purely as one of settled practice. In both of these decisions it was held that the State practice was imported into proceedings in the State Courts against the Government of the United States for redress of grievances arising out of Federal control. And in *Genga* v. *Director General of Railroads*, at page 111, it was said:

> "To hold that there can be no amendment in the case at bar would operate as a genuine hardship because the statute of limitations has long ago run against one of the plaintiff's alleged claims and he can not prosecute it unless allowed to amend."

It is submitted that the Supreme Judicial Court of Massachusetts was deciding a matter of substance, and not of procedure, and was applying to a cause of action against the Federal Government, granted by Act of Congress, the special regulations and policies of the Commonwealth of Massachusetts. In other words, the construction of the State law as to amendments makes that Act repugnant to the Federal laws.

It is submitted that, when by the very statute creating the right of action the lapse of time not only bars the remedy but destroys the liability, the question of the time

when the Federal Agent may be substituted becomes a matter of substance, and not of procedure.

> *Central Vt. Ry. Co.* v. *White*, 238 U.S. 507, 511.
> *Phillips* v. *G.T. Ry. Co.*, 236 U.S. 662.

This is true as to the burden of proof; under the Federal Employers' Liability Act the plaintiff must affirmatively establish negligence whatever the State rule may be. It is a matter of substance, and local *prima facie* statutes become inapplicable.

> *Central Vt. Ry. Co.* v. *White, supra.*
> *New Orleans & N.E. R. Co.* v. *Harris*, 247 U.S. 367.

So it is with reference to directing verdicts.

> *North Penna. R. Co.* v. *Commercial Bk.*, 123 U.S. 727.

And this Court has held generally that the special regulations and policies of the particular States on the subject of the carrier's liability for loss and damage to interstate shipments and the contracts of carriers with respect thereto have been superseded.

> *M., K. & T. Ry. Co.* v. *Harris*, 234 U.S. 412, 420.

In *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 21, this Court stated:

> "The law of the United States can not be evaded by the forms of local practice . . . The local rule applied as to the burden of proof narrowed the protection that the defendant had secured and therefore contravened the law."

In *Davis* v. *Wechsler*, 263 U.S. 22, 24, involving the validity of General Order 18-A, this Court said:

> "Whatever springes the state may set for those

who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . . If the Constitution and laws of the United States are to be enforced, this Court can not *accept as final the decision of the state* tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds . . . This is familiar as to the substantive law, and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

IV. Conclusion.

It is respectfully submitted that the judgment of the Superior Court for the Commonwealth of Massachusetts entered in accordance with the rescript from the Supreme Judicial Court should be reversed.

ARTHUR W. BLACKMAN,
Counsel for James C. Davis, Agent,
Plaintiff in Error, Petitioner for Certiorari.

Office Supreme Court, U. S.
FILED
MAR 16 1925
WM. R. STANSBURY
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Supreme Court of the United States.

October Term, 1924.

No. 331.

JAMES C. DAVIS, AGENT,
PLAINTIFF IN ERROR AND PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
DEFENDANT IN ERROR AND RESPONDENT.

ON WRIT OF ERROR AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS.

Brief for Defendant in Error and Respondent.

LOUIS SWIG,
Counsel for L. L. Cohen & Co., Inc.,
Defendant in Error, Respondent.

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ERRATA.

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Page 6	Dahn v. Davis, 258 U. S. 421.
Page 6	Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554.
Page 6	Director General v. Kastenbaum, 263 U. S. 25.

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 331.

JAMES C. DAVIS, AGENT,
Plaintiff in Error and Petitioner,
v.
L. L. COHEN & COMPANY, INC.,
Defendant in Error and Respondent.

ON WRIT OF ERROR AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS.

BRIEF FOR DEFENDANT IN ERROR AND RESPONDENT.

Questions Involved.

1. Whether a ruling by a State Court upon a matter relating to pleading and practice under a state statute is binding upon the Federal Courts.

2. Whether the substitution of a party defendant, permissible under a State statute, reverts back to the date of the commencement of the action, so as not to be affected by the intervening lapse of time.

3. Whether the statutes of Massachusetts permitting the substitution of parties in a pending action and the interpretation thereof by the Massachusetts Supreme Judicial Court are in conflict with the provisions of the Transportation Act and the bill of lading.

Argument.

I. The substitution was within the discretion of the Court under the Massachusetts statutes.

Massachusetts General Laws, chapter 231, sections 51 and 138, provide as follows:

> "Section 51. The court may, at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enable the defendant to make a legal defence."

> "Section 138. The cause of action shall be considered to be the same for which the action was brought, if the court finds it to be the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed; and the allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action. But no subsequent attaching creditor or purchaser of property attached or bail or any person other than the parties to the record shall be bound by such allowance unless he has had due notice of the application for leave to amend and opportunity to be heard thereon, according to an order of notice to that effect to be issued by the court upon application of the plaintiff, and such third parties shall have the right of exception or appeal."

II. State pleading and practice is binding upon Federal Courts.

Amendments are matters relating to pleading and practice, and as such are binding upon Federal Courts.

Central Vermont Railroad v. *White*, 238 U.S. 507.
Nelson v. *Brown*, 23 Mo. 13.
Boyle v. *Bloom*, 36 Kans. 512.

What constitutes the commencement of an action in a State Court being a matter of State law, the decision of that Court on this point is not a Federal question.

Richmond Mining Company v. *Rose*, 114 U.S. 576.
Stevens's Adm. v. *Nichols*, 157 U.S. 370.
Renaud v. *Abbott*, 116 U.S. 277.

An inspection of the declaration shows that the cause of action remained the same from beginning to end, and that the only change in the proceedings was to describe the defendant as "James C. Davis, agent and director general of railroads, in possession and control of the New York, New Haven & Hartford Railroad Company, controlled and operated by the United States Railroad Administration," rather than "New York, New Haven & Hartford Railroad Company . . . controlled and operated by the United States Railroad Administration."

The intention of the parties as disclosed by the pleadings has some weight with the Court.

Davis v. *Wechsler*, 263 U.S. 22, 24.

III. Federal Courts, like State Courts, allow amendments where the cause of action remains the same.

The practice of Federal Courts is to permit amendments which enable the plaintiff to maintain an action for which it was intended to be brought, and to consider the cause of action the same if the Court finds it to be the cause of action relied on by the plaintiff when action was commenced.

Central Vermont Railroad v. *White*, 238 U.S. 507.

Seaboard Air Line v. *Renn*, 241 U.S. 290.

IV. An amendment relates back to the commencement of an action.

It is well established that, when an amendment has been properly made, and is for the same cause of action originally embraced in the writ, it relates back to the commencement of the action, and is not affected by an intervening lapse of time.

Seaboard Air Line v. *Renn*, 241 U.S. 290, 293.

Texas & Pacific Railway Co. v. *Cox*, 145 U.S. 593, 603.

Texas Cement Co. v. *McCord*, 233 U.S. 157, 164.

Heath v. *Whitten*, 29 Me. 108.

Prescott v. *Tufts*, 4 Mass. 146.

Drew v. *President*, 55 Me. 450.

Ball v. *Claflin*, 5 Pick. 303.

Blanchard v. *L.S. & M.S. Ry. Co.*, 126 Ill. 416.

So here the substitution was not deemed a change in the cause of action, and the substitution, being properly allowed, related back to the original date of the writ, and as the original writ was dated January 9, 1920, the proceedings were commenced well within the limitation of time set forth in the Transportation Act and in the bill of lading.

Texas & Pacific Railway Co. v. *Cox*, 145 U.S. 593, 603.

Arkansas Land & Lumber Co. v. *Davis*, 244 S.W. 730 (Ark.).

Payne v. *Stockton*, 147 Ark. 598.

Bailey v. *Hines*, 109 S.E. 470.

Aetna Mills v. *Director General of Railroads*, 242 Mass. 255.

Numinsky v. *New York, New Haven & Hartford Railroad Co.*, 234 Mass. 357.

Genga v. *Director General of Railroads*, 243 Mass. 101.

There is some seeming contrary authority:

Weil et al. v. *New York Central Railroad*, 196 N.Y. Supp. 869.

It may be in point to observe that in the Weil case the Court appeared to predicate its finding upon the theory that "no attempt was made to describe or refer to the Director General in the summons," leaving it open to fair conjecture that, with the facts as they are in this case, namely, some reference to the control of the Government in the writ, the decision of the Court would have been in harmony with that of the Courts cited above.

The allowance of the substitution of the party defendant as of the date of the commencement of the action is in accord with the policy of the State and Federal Courts not to permit technicalities to hinder justice.

Arkansas Land & Lumber Co. v. *Davis*, 244 S.W. 730.

Wolf v. *Cook*, 40 Fed. 432.

Bailey v. *Hines*, 109 S.E. 470.

Texas & Pacific Railway Co. v. *Cox*, 145 U.S. 593.

Atlantic & Pacific Railroad Co. v. *Laird*, 169 U.S. 393.

V. The United States made provision for suits such as was here brought.

The provisions of the Transportation Act contemplated suits in State Courts, and, as was said of another statute, "state procedure may be said to have been accepted in ad-

vance, and there appears to be no reason why it should have been supposed to have excluded ordinary incidents of state procedure."

Dickinson v. *Stiles*, 246 U.S. 631, 633.
Robb v. *Connolly*, 111 U.S. 624.
Second Employers' Liability Cases, 223 U.S. 1, 56.

While the United States Government may not be sued without its consent, yet, under certain circumstances, it subjects itself to suit on grounds broader than the strict limitations of a statute authorizing suit.

Dahn v. *Davis*, 257 U.S. 421.

However this may be, the Government here gave its consent to be sued, for it is clearly stated in the Federal Control Act (40 St. L. 451, c. 25) that, "in any action at law, or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

The Government undertook as carrier to observe all existing laws; as has been well stated by this Court in the cases of—

Missouri v. *Ault*, 256 U.S. 554.
Director General v. *Kastenbaum*, 263 U.S. 25.

And this observance carried with it an observance of the rules of practice of the jurisdiction wherever the cause of action would arise.

And while the question here involved has not been directly passed on by this Court so far as the defendant in error is aware, it may not be amiss to observe that this Court has cited with approval *Genga* v. *New York, New Haven & Hartford R.R.*, 243 Mass. 101, which case, in certain of its aspects, involved the instant issue.

Director General v. *Kastenbaum*, 236 U.S. 25.

VI. Cases where substitution has been refused have been predicated upon the wording of State statutes and where there has been a personal obligation on the part of a public officer.

A casual reading of some cases leads to the notion that this Court has inferentially created precedents favorable to the plaintiff in error, but it is the view of counsel that these cases really support the view of the defendant in error.

Pullman Co. v. *Croom*, 231 U.S. 571.
Smietanka v. *Indiana Steel Co.*, 257 U.S. 1.
Whalen Paper & Pulp Mills v. *Davis*, 288 Fed. 438.
Union Pacific Ry. Co. v. *Wyles*, 158 U.S. 285.
United States v. *Dalcour*, 203 U.S. 408, 423.
Texas Cement Co. v. *McCord*, 233 U.S. 157, 164.
Davidson v. *Payne*, 289 Fed. 69.

In *Pullman Co.* v. *Croom*, 231 U.S. 571, the Court was dealing with mandamus, and pointed out that the purpose of a writ of mandamus is to enforce personal obligation of an individual, and that mandamus does not reach the office, wherefore there could be no substitution.

That case does not hold here, because there was no personal obligation of the Director General involved.

In *Smietanka* v. *Indiana Steel Co.*, 257 U.S. 1, the Court was again discussing an action where a public officer was personally liable.

While in *Whalen Paper & Pulp Mills* v. *Davis*, 288 Fed. 438, the question of proper service was the determining point, and in that case there had not been proper service.

The case of *Union Pacific Ry. Co.* v. *Wyles*, 158 U.S. 285, holds that "an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this ruling applies only to an amendment which

does not create a new cause of action." The Court rightly enough held that an amendment switching a cause of action founded on the general law of master and servant to one founded on a Kansas statute was a new cause of action.

And so too in *United States* v. *Dalcour,* 203 U.S. 408, 423, there was an endeavor to shift the cause of action predicated upon treaty to one founded on statute, and naturally enough the Court held the proposed amendment was not the same cause of action.

In *Texas Cement Co.* v. *McCord,* 233 U.S. 157, 164, the Court stated that an amendment dates back to the filing of a petition; but the original suit, having been prematurely brought, an intervention of parties seeking to avail themselves of the earlier suit was futile.

In *Davidson* v. *Payne,* 289 Fed. 69, there was no substitution of a proper person against whom action would lie, and besides, at the time the suit was brought, there was no such person in office as the one described in the writ.

Chrisp v. *Davis,* 263 U.S. 710, in which a petition for certiorari came up from an Arkansas Court (159 Ark. 305), involved an interpretation of a State statute, and the Federal Court merely followed the State Court in its interpretation of the state practice and the statute.

In *Davis* v. *Wechsler,* 263 U.S. 22, the Court stated that "local practice shall not be allowed to put unreasonable obstacles in the way," and apparently construed the action of the State Court as "an unreasonable obstacle," because of the disregard by the State Court of plain provisions of the Federal statute, which provided where a suit should be brought.

A sense of justice and the intent of Congress as reflected in legislation passed since the original Transportation Act speak out against the mere technicalities raised by the plaintiff in error. Congress by the language of the Transportation Act and the amendment of March 3, 1923, intended no just claim to be side-tracked through errors of

form in bringing suits arising out of the Government operation of railroads.

Transportation Act of 1920, 41 St. L. 456, par. a, sec. 206.

Transportation Act as amended, 42 St. L. 1443, c. 233.

VII. Conclusion.

It is respectfully submitted that the judgment of the Superior Court of the Commonwealth of Massachusetts, entered in accordance with the rescript from the Supreme Judicial Court, was in accord with sound principles of justice, and in harmony with the rules of practice and pleading in the Courts of Massachusetts and of the Federal Courts.

LOUIS SWIG,
Counsel for L. L. Cohen, Inc.,
Defendant in Error and Respondent.

DAVIS, AGENT, *v.* L. L. COHEN & COMPANY, INC.

ERROR TO THE SUPERIOR COURT OF BRISTOL COUNTY, STATE OF MASSACHUSETTS.

No. 331. Argued April 21, 1925.—Decided June 8, 1925.

1. A judgment entered in the Superior Court in Massachusetts in accordance with a rescript from the Supreme Judicial Court on exceptions reserved, *held* reviewable on writ of error directed to the Superior Court. P. 639.
2. The cause of action for damage to goods in transport over a railroad under federal control was against the Director General of Railroads exclusively. P. 640.
3. When such an action was erroneously brought against the railroad company, it could not be treated as an action against the Director General; and service of process did not bring him into court though made on an agent of the company who might have been properly served in an action against the Director General. *Id.*
4. Where such an action against a railroad company was pending at the termination of federal control, *held*, (a), that substitution, as defendant, of the Agent appointed by the President under the Transportation Act, 1920, is not permissible under § 206(d) thereof, which relates only to suits previously brought against the Director General; (b), that such substitution is in effect the commencement of a new action, and a state statute construed as allowing this by amendment later than two years from the date of the Transportation Act is repugnant to the time limitation in § 206(a) of that Act and void. P. 642.

247 Mass, 259, reversed.

ERROR to a judgment entered in a Superior Court of Massachusetts upon a rescript from the Supreme Judicial Court, in an action for damages, begun against a railroad company, in which the Agent appointed by the President under the Transportation Act was substituted as party defendant.

Mr. Arthur W. Blackman for plaintiff in error.

Mr. Louis Swig for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This writ of error is brought to review a judgment in favor of Cohen & Co., entered in the Superior Court of Bristol County, Massachusetts, against James C. Davis, as Agent designated by the President under the Transportation Act, 1920.[1] After a verdict had been rendered, but before entry of judgment, the case was reported by the Superior Court to the Supreme Judicial Court for instructions upon exceptions that had been reserved by both parties; and thereafter, in accordance with a rescript from the Supreme Judicial Court (247 Mass. 259), the judgment in question was entered in the Superior Court. Under the Massachusetts practice that was followed, the judgment is to be regarded as the final decision of the highest court of the State in which a decision could be had; and the writ of error was therefore properly directed to the Superior Court. *McGuire* v. *Commonwealth,* 3 Wall. 382, 386. And see *Joslin Co.* v. *Providence,* 262 U. S. 668, 673.

A petition for certiorari has also been filed, but as the case is properly here on writ of error, that petition is denied.

The sole question here presented is whether the provisions of the Massachusetts General Laws, c. 231, §§ 51, 138, authorizing amendments in any process, pleading, or proceeding at any time before final judgment, as construed and applied in this case, are invalid because of repugnancy to § 206 of the Transportation Act.

The suit was brought by Cohen & Co., in January, 1920, against the New York, New Haven & Hartford Railroad Co., to recover for damages to a carload of scrap iron shipped over the railroad in 1918, when it was under Federal Control. While the Railroad Company was described

[1] Act of Feb. 28, 1920, c. 91, 41 Stat. 456.

in the writ as a corporation "operated and controlled by the United States Railroad Administration," the writ was directed to, and served upon, the Railroad Company alone, and the declaration was filed against it alone; no effort being then made to sue the Director General. The Railroad Company appeared and filed an answer denying the allegations of the declaration.

No further proceedings were had until September, 1922, when on the *ex parte* motion of the plaintiff, the writ and declaration were amended by striking out the name of the Railroad Company, and substituting the name of James C. Davis, Agent, and the Director General of Railroads, as the party defendant. An order of notice was then served upon Davis, who appeared specially, and moved that such service be set aside and the action against him dismissed, on the grounds that the service was void and the court was without jurisdiction to entertain the action against him, because the proceeding against him had not been instituted within the time prescribed by § 206 of the Transportation Act; and that any provisions of the Massachusetts laws purporting to authorize such proceeding were repugnant to the Transportation Act and void. This motion was denied, and Davis was required to answer. The case, in which, at every stage, he preserved his original objections, finally resulted in the judgment against him which it is now sought to review.

Our conclusions may be briefly stated. The Railroad Company was not liable for the cause of action that had arisen during Federal Control; the sole liability being that of the Director General as the representative of the Government. *Missouri Pacific Railroad* v. *Ault*, 256 U. S. 554, 557. The original suit against the Railroad Company was not a suit against the Director General, and the service of the original writ upon the Railroad Company did not bring him before the court. While originally, after the passage of the Federal Control Act, it was sometimes

thought that the Government might be held liable in a suit brought against the carrier, describing it as in the hands or possession of the Director General, all doubts as to how the suit should be brought was cleared away by the General Order of the Director General requiring that it should be brought against the Director General of Railroads, and not otherwise. *Ault Case, supra,* p. 561 (1921).[2] And it is immaterial that, as admitted at bar, the service of the writ against the Railroad Company was made upon a clerk upon whom process against the Director General might have been served if the suit had been brought against him. " The Federal agent was not bound to take cognizance of an action against the railroad corporation, even though the service was on the same local station agent, and even though the complaint stated a cause of action for personal injuries sustained during government control." *Davis* v. *Chrisp,* 159 Ark. 335, 343.

The Transportation Act, which passed in February, 1920, provided that the Federal Control should terminate on March 1, 1920. It further provided, in § 206(a), that suits and proceedings based on causes of action arising out of the possession, use and operation of a railroad under Federal Control, of such character as prior thereto could have been brought against the railroad company, might, after the termination of Federal Control, be brought against an agent designated by the President for such purpose, " but not later than two years from the date of the passage of this Act." It also provided, in § 206(d), that actions of the character above described, pending at the termination of Federal Control, should not abate by reason of such termination, but might be prosecuted to

[2] See General Order No. 50 of the Director General, Oct. 28, 1918; amended by General Order No. 50-A, Jan. 11, 1919. U. S. Railroad Administration Bulletin No. 4 (Revised), p. 334; and Supplement, p. 58.

final judgment, substituting the agent designated by the President.

At the termination of Federal Control there was no suit pending against the Director General to enforce the liability of the Government. The amendment of the writ and declaration in the suit against the Railroad Company, in October, 1922, by substituting the designated Agent as the defendant, was, in effect, the commencement of a new and independent proceeding to enforce this liability. Being commenced more than two years after the passage of the Transportation Act, it was repugnant to the provision of § 206(a) requiring such an action to be instituted not later than two years after the passage of the Act. This was the only consent the Government had given to being sued in such an action after the termination of Federal Control. Nor was this amendment authorized under § 206(d), which related solely to the substitution of the designated Agent as the defendant in a suit which had been previously brought against the Director General to enforce the liability of the Government, that is, merely authorized the substitution, in such a suit, of another Federal agent for the one already before the court. It had no application to suits pending against a railroad company alone in which there was no Federal agent for whom the designated Agent could be substituted, where the substitution of the designated Agent for the railroad company would work an entire change in the cause of action.

These conclusions, we may add, are substantially the same as those of the State courts in *Fahey* v. *Davis*, 224 Mich. 371; *Fischer* v. *Wabash Railway*, 235 N. Y. 568; *Currie* v. *Louisville & Nash. Railroad*, 206 Ala. 402; *Davis* v. *Chrisp*, 159 Ark., *supra;* and *Davis* v. *Industrial Commission* (Ill.), 146 N. E. 569.

It results that the provisions of the Massachusetts General Laws under which the plaintiff was allowed to amend

the writ and declaration so as to substitute the designated Agent as the defendant instead of the Railroad Company, as construed and applied in the present case, are void because of repugnancy to § 206 of the Transportation Act.

The judgment of the Superior Court is reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.